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Supreme Court, U.S.
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No. 00-1831

IN THE

Supreme Court of the United States

UNITED STATES of AMERICA, acting through the INTERNAL REVENUE SERVICE,

Petitioner,

v.

SANDRA L. CRAFT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to consider the petition or is the petition by the Internal Revenue Service time-barred?

2. Is the only proper issue on appeal the correct application by the Sixth Circuit of the doctrines of "Law of the Case" and "Law of the Circuit" in the case below?

3. Did the Sixth Circuit correctly decide the issue of tax lien attachment either or both times it ruled on the matter in this case?

4. Whether this case presents issues of sufficiently far-reaching importance for the Court to exercise its certiorari powers?

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JURISDICTION

The Respondent respectfully asserts that this Court does not have jurisdiction to entertain the petition of the Petitioner based on its failure to comply with the terms of 28 U.S.C. § 2101.

The Petitioner makes the same argument before this court as it did in its petition before the Sixth Circuit Court of Appeals unsuccessfully on September 16, 1997. The Sixth Circuit ruled against the Petitioner in its first opinion in this case, *Craft v. United States*, 140 F.3d 638 (6th Cir. 1998) ("*Craft I*") released on April 1, 1998. However, the Petitioner chose not to appeal the adverse ruling of the Sixth Circuit within ninety days as required by statute. *See* 28 U.S.C. § 2101(c).

The requirements 28 U.S.C. § 2101 are mandatory and jurisdictional in nature. *Fed. Election Commsn. v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994), citing *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Failure to comply with the requirements of 28 U.S.C. § 2101 results in this Court not having jurisdiction to entertain the petition before it. *NRA*, 513 U.S. at 99; *Jenkins*, 495 U.S. at 45; *Fed. Trade Commsn. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 207-208 (1952).

The fact that the Sixth Circuit remanded the case back to the District Court for consideration of an entirely different issue, does not alter the finality of the Sixth Circuit's reversal of the earlier District Court's decision on the issue raised by the Petitioner's petition. No argument on the issue of tax lien attachment to tenancy by the entireties real property was heard by the District Court on remand, and the Sixth Circuit refused to allow the IRS to make the same argument to it on appeal for the second time in this case. *Craft v. United States*, 233 F.3d 358, 363, 369, 375 (6th Cir. 2000) ("*Craft II*")

Since there was no change whatsoever, material or otherwise, in the original determination of the Sixth Circuit on the issue of tax lien attachment to tenancy by the entireties property either on remand to the District Court or on appeal to the Sixth Circuit the second time, the IRS had to have filed its petition for writ of certiorari no later than July 29, 1998 for its

petition to have been considered timely under 28 U.S.C. § 2101(c). However, the Petitioner failed to file by that date. The mere fact an earlier judgment is restated or revised in an immaterial way does not toll the time within which review must be sought. *Fed. Trade Commsn. v. Colgate-Palmolive Co.*, 380 U.S. 374, 378 (1965), citing *Fed. Trade Commsn. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-213 (1952) and *Fed. Power Commsn. v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Dept. of Banking v. Pink*, 317 U.S. 264 (1942); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

Furthermore, this case is factually different from a procedural standpoint from those cases where this Court has held the Court of Appeals made a material change in the primary or significant issue at stake (*See Zimmern v. United States*, 298 U.S. 167 (1936)), or cleared up a genuine ambiguity when the case came before it a second time (*Idaho Power Co.*, 344 U.S. at 20), thereby allowing a proper petition for writ of certiorari to be filed within ninety days of the release of the second decision by the respective Court of Appeals.

In fact, no change whatsoever has occurred in the Sixth Circuit's single main holding released on April 1, 1998, the IRS chose not to appeal the ruling at that time, the petition for writ of certiorari is therefore not timely under the requirements of 28 U.S.C. § 2101(c), and this Court should reject the petition on the grounds of lack of proper jurisdiction.

CORRECTED STATEMENT OF THE CASE

Both Petitioner's Statement of the Case and its Reasons for Granting the Petition contain numerous misstatements, omissions of fact and introduce factual evidence for the first time throughout its brief. Accordingly, Respondent offers the following clarifications to correct the account of the facts given by the Petitioner for this case.

Paragraph 1.b. of the Petitioner's Statement of the Case discloses the stipulation entered into between the IRS and the Respondent to allow the sale of the home, but fails to indicate that, under the terms of the original stipulation, the escrowed

proceeds would be subject to the same right, title and interest the tax lien had on the property itself. (*See Craft I*, 140 F.3d at 640; Memorandum of Law in Support of United States' Motion for Summary Judgment filed 9/13/93, Summary of Case, page 2, Statement of Fact #12, page 3).

The Petitioner goes on to state in paragraph 3.a. on page 4 while describing the first Sixth Circuit decision in 1998 that, "In reaching that conclusion, the majority relied on the common-law fiction, adopted in Michigan, that property held in a tenancy by the entirety is not owned by either spouse but is instead owned by the 'marital unit' ", and repeats that misstatement again on page 17. Nothing could be more inaccurate. The Sixth Circuit decision in *Craft v. United States*, 233 F.3d 358 (6th Cir. 2000) ("*Craft II*"), which was authored by Judge Guy Cole who also wrote the *Craft I* opinion, specifically rejects that recurring statement by the IRS. ("Indeed, the *Craft I* court rejected the IRS's argument that it was being duped by a state law legal fiction." *Craft II*, 233 F.3d at 368). Despite that inaccurate description being specifically rejected by the Sixth Circuit both times, that phrase permeates the Petitioner's argument throughout this case in an ill-advised attempt to have this Court seize upon that language and conclude that this case is appropriate for review as being contrary to the holding of *United States v. Irvine*, 511 U.S. 224 (1994) which does discuss the principle of state law fictions not precluding the operation of federal tax liens.

While it is part of the Petitioner's later argument, footnote 5 on page 10 of the Petitioner's brief contains factual representations from another case that have never been considered by any lower court in this case. Furthermore, the Petitioner uses those supposed facts to reach a legal conclusion which is patently false. The Petitioner states,

> Instead of paying these taxes, the lawyer used his untaxed income to accumulate equity in four parcels of property that he placed in a tenancy by the entirety.* * *, but the taxpayer's transparent scheme

> to avoid collection appears likely to succeed in the absence of review by this Court of the decision in this case.

However, nothing could be further from the truth. In fact, the exact opposite occurred in this case since a recovery was realized by the IRS. In this case, on remand the District Court held that where mortgage payments by the delinquent taxpayer created additional equity in the tenancy by the entireties real property, the payments fraudulently enhanced the tenancy to the detriment of his creditors including the IRS, and the Court entered a judgment against the escrowed funds in the amount of equity created by those payments. *Craft v. United States*, 65 F. Supp. 2d 651, 658-659, 661-662 (W.D. Mich. 1999); affirmed by *Craft II*, 233 F.3d at 370-371. A denial of certiorari would preserve, if anything, the status quo and would preserve the IRS's current ability to recover equity from the other delinquent taxpayer under the supposed facts alleged, based on the lower court rulings in this case and existing Michigan caselaw.

At footnote 7 on page 11 of the Petitioner's brief, the IRS again attempts to support its argument with representations about factual statistics that have never been entered into evidence nor considered by any court at any level at any time in this case.

The IRS, on pages 12 and 13 of the petition, also improperly restates a statutory definitions argument that was first raised at oral argument on appeal before the Sixth Circuit on August 10, 2000, the second time that Court heard this case.

The Petitioner also ignores prior holdings of the Michigan Supreme Court in defining property rights under Michigan law when it refers to the "right of survivorship". The Michigan Supreme Court, which stands as the Court of last resort in interpreting Michigan common law, held that survivorship is actually an incident of the tenancy, and not a separate property right. *Budwit v. Herr*, 339 Mich. 265, 272-273 (1954); *Sanford v. Bertrau*, 204 Mich. 244, 248-249 (1918).

The IRS petition makes various representations in footnote 16 about the characteristics of tenancies by the entireties in various states, without ever having presented evidence or proof of that information to any lower court in this case. The Petitioner also makes these assertions to this Court without further explaining that even within its subgroup of states that prohibit creditors of one spouse from executing against entireties property, there are varied state law definitions of the tenancy in those states such that a federal tax lien may or may not attach to entireties property in that state.

REASONS FOR DENYING THE WRIT

The Respondent contends that it is unnecessary for this Court to review the two decisions of the Sixth Circuit in the present case since: (1) the Court does not have proper jurisdiction based upon the Petitioner's failure to have filed its petition in accordance with the requirements of 28 U.S.C. § 2101(c); (2) no conflict between the Circuits has been alleged; (3) there are no far-reaching implications or compelling reasons since it has not been previously demonstrated to any lower court that these decisions effect anyone other than Michigan taxpayers; and (4) the well-reasoned opinions of the Sixth Circuit in 1998 and 2000 both correctly set forth the analysis that its decisions do not conflict with any established, controlling precedent by this Court, nor any recent changes in the law.

A. The relief sought by the IRS Petition is time-barred.

This action was originally commenced on April 26, 1993 as an Action to Quiet Title by Plaintiff Sandra Craft against the Internal Revenue Service. After two proceedings in 1994 and 1995 before the U.S. District Court for the Western District of Michigan, the issue presented by the IRS Petition was argued on appeal to the U.S. Sixth Circuit Court of Appeals on September 16, 1997. The opinion and judgment of the Sixth Circuit was released on April 1, 1998 and the IRS filed no Notice of Appeal within the 90-day period to do so after that date. 28 U.S.C. § 2101(c). That opinion reversed the District Court on the issue now presented by the IRS's Petition and only remanded the case back to the District Court for consideration of an entirely different and separate issue. Even the District

Court Judge indicated on remand that the Sixth Circuit had decided with finality the issue of the tax lien of one spouse attaching to tenancy entireties property in Michigan,

> In addition, the Sixth Circuit held that Don did not possess a separate future interest in the Berwyck Property to which the lien could have attached. *See id.* at 644. Thus, the Sixth Circuit effectively held that Sandra prevailed on her complaint to quiet title. However, the court found that "[d]espite the fact that the tax lien did not attach to the Berwyck Property, there remains an issue of whether a fraudulent conveyance occurred in this case. . . ." Accordingly, the Court remanded the case for determination of the fraudulent conveyance issue.

Craft v. United States, 65 F. Supp. 2d 651, 653 (W.D. Mich. 1999).

As indicated by the District Court on remand, the reversal by the Sixth Circuit served as a final adjudication on the merits of the IRS claim by holding that the tax lien of one spouse did not attach to the property while held as tenants by the entirety. No new argument on this issue has been entertained by any court in this case since September 16, 1997.

B. The appeal from the decision of the Sixth Circuit should be limited to the correct application of the "law of the case" and "law of the circuit" doctrines.

"Under the law of the case doctrine, a court ought not reopen issues decided at an earlier point in the same litigation." *See Agostino v. Felton*, 521 U.S. 203, 236 (1997), as cited in *Craft II*, 233 F.3d at 363. As *Craft II* succinctly stated,

> At this juncture, this case is not really about federal tax liens. Nor is it about state law property rights. This case is about the extent to which a prior decision of this court binds a subsequent panel when neither the facts, the parties, nor the law has changed. On appeal, the IRS reasserts its argument that a §6321 federal tax lien against an individual taxpayer

> attaches to a tenancy by the entirety that the taxpayer shares, pursuant to Michigan law, with his spouse. *This is, of course, the very argument we rejected in Craft I.* For the reasons that follow, the government is precluded from re-arguing its case at this time.

(Emphasis added). *Craft II*, 233 F.3d at 363.

With no ability to re-argue the issue, the last court to properly hear the tax lien argument was the Sixth Circuit in 1997, and the IRS did not appeal after the April 1, 1998 decision was released. To allow the IRS to again make its argument after it chose not to appeal in 1998, would be to allow the IRS "to 'panel-shop' and pursue, willy nilly, two or more bites at the apple of settled law." *Craft II*, 233 F.3d at 365.

The law of the case doctrine is designed to insure that, "Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." *Hanover Insur. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997). *Hanover* set out three alternate grounds for reconsidering a prior ruling in the same case: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Hanover*, 105 F.3d at 312.

On the second Sixth Circuit appeal the Court found that its earlier decision was not clearly erroneous, and therefore never reached the other required part of that ground for reconsideration that the decision would work a manifest injustice. *Craft II*, 233 F.3d at 364-365. The IRS only included one new case which had not been argued before the Sixth Circuit earlier in 1997. The Sixth Circuit rejected the IRS argument that this Court's decision in *Drye v. United States*, 528 U.S. 49 (1999) represented a subsequent contrary view of the law as decided by the controlling authority. *Craft II*, 233 F.3d at 366-369. Despite the District Court conducting an evidentiary hearing in 1999 on remand, the IRS submitted no new evidence whatsoever

to the Sixth Circuit at the second appeal on the issue of federal tax lien attachment to tenancy by the entireties property.

The Sixth Circuit also held that *Craft I* and its predecessor, *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971), constituted law of the circuit and could not be overturned by a subsequent panel. It reached that decision after holding that *Craft I* was not clearly erroneous, and had not been called into doubt by any subsequent decision of this Court. *Craft II*, 233 F.3d at 369.

The law of the case and law of the circuit are principles which, like the jurisdictional restrictions contained in 28 U.S.C. § 2101, are designed to promote the universal principle of all courts that all "litigation must at some definite point be brought to an end." *Minneapolis-Honeywell*, 344 U.S. at 213, citing *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943). Both principles were correctly applied by the Sixth Circuit panel in *Craft II* and should not be disturbed on appeal.

C. The relief being sought by the IRS is barred by the terms of the original escrow stipulation.

The IRS argument throughout this litigation has been that the tax lien attached to some interest of Don Craft prior to the August 28, 1999 Quit-Claim Deed which allowed the lien to remain inchoate until the tenancy was terminated. The IRS has conceded that the binding stipulation between Respondent and the IRS was such that "50% of the net proceeds were retained in escrow subject to the same right, title and interest that the federal tax lien had in the property itself." (Memorandum of Law in Support of United States' Motion for Summary Judgment filed 9/13/93, Summary of Case, page 2, Statement of Fact #12, page 3; *also Craft I*, 140 F.3d at 640).

The language of the stipulation contained in the escrow letter was clear and unequivocal in that it applied to the 50% share of the net proceeds from the earlier sale of the house, which were being escrowed. Therefore, to the extent the IRS tax lien had any validity whatsoever, it would only have attached to those escrowed proceeds and remained so until some future termination of the tenancy by virtue of either a[nother] future conveyance, the couple's divorce, or death of one spouse.

The next development that would terminate the tenancy by the entirety was the death of Don Craft on August 10, 1998. Upon the death of one spouse in a tenancy by the entirety, the surviving spouse owns the property in fee simple absolute, which was the Respondent. (*See* concurrence of Judge Gilman, *Craft II*, 233 F.3d at 378; *United States v. Certain Real Property Located at 2525 Leroy Lane*, ("Leroy Lane I") 972 F.2d 136, 138 (6th Cir. 1992); *Rogers v. Rogers*, 136 Mich. App. 125, 135 (1984)). The original escrow stipulation signed between the parties renders the very relief the IRS seeks moot and is barred by its own specific terms.

D. The Sixth Circuit decision on the issue raised by the IRS's petition was correct in 1998, was correct in 2000, and is correct now.

The IRS's petition is a final attempt to have this Court judicially "occupy the field" by establishing a national common law of real property.

The IRS petition suggests the two decisions of the Sixth Circuit conflict with decisions of this Court. *Drye v. United States*, 528 U.S. 49 (1999); *United States v. Irvine*, 511 U.S. 224 (1994); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); *United States v. Rodgers*, 461 U.S. 677 (1983) and *Tyler v. United States*, 281 U.S. 497 (1930).

However, the Respondent relies on some of the same Supreme Court cases for the holding that state law determines the nature of legal interest a taxpayer has in property. *Bank of Commerce*, 472 U.S. at 722, citing *Aquilino v. United States*, 363 U.S. 509, 513-514 (1960) and *Morgan v. Commissioner*, 309 U.S. 78, 82 (1940). "Federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *Bank of Commerce*, 472 U.S. at 722, citing *United States v. Bess*, 357 U.S. 51, 55 (1958). Those consequences are then left to Federal law to determine. *Bank of Commerce*, 472 U.S. at 722, citing *Rodgers*, 461 U.S. at 683.

Upon review, it becomes clear that all the cases relied upon by the IRS are either in harmony with the Sixth Circuit decisions,

or are distinguishable. *Tyler* actually reviewed three lower court cases, one relating to stock held as tenants by the entirety in Maryland (something which Michigan does not permit) and two cases concerning real property held as tenants by the entirety in Pennsylvania. *Tyler*, 281 U.S. at 499-500. The distinguishing factor in *Tyler* is that the Court was faced with a tax statute that specifically included tenancy by the entireties interests in a decedent's estate. *Id.* at 500-501. Interestingly, the decision reached by the *Tyler* Court and the underlying basis for it, mirror the result in this case below. Justas the lower Courts in *Craft* have held, the Court in *Tyler* held that it would not allow a tenancy created with the funds of one, to be unfairly shielded from that individual's taxing creditors. *Id* at 501-504. Even as the IRS holds out *Tyler* as an example of a prior decision of this Court finding that state law "fictions" do not prevent the exercise of tax enforcement, that decision repeats the very principle which makes the decisions below correct in this case: "[t]hese decisions establish a state rule of property, by which, of course, this court is bound." *Id* at 501, citing *Warburton v. White*, 176 U.S. 484, 496 (1900).

The petition *United States v. Rodgers* for the proposition that "state-created exemptions" are ineffective against federal tax liens. What that argument fails to recognize is the distinction between state-created exemptions, and state law definitions of property. Even *Rodgers* in its discussion on legislative history and entireties cases stated, "[those cases] do no more than illustrate the proposition that, in the tax enforcement context, federal law governs the consequences that attach to property interests, but state law governs whether any property interests exist in the first place." *Rodgers*, 461 U.S. at 702-703 n.31 (1992). Such a statement could not be clearer.

The Respondent asserts that *Bank of Commerce* actually supports her position. While that case includes the quote cited by the IRS petition stating that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law" *Bank of Commerce*, 472 U.S. at 727, the IRS has been unable to refute the holding that, "the federal statute 'creates no property rights but merely attaches consequences,

federally defined, to rights created under state law.' " *Id.* at 722 (1985), quoting *Bess*, 357 U.S. at 55.

The IRS in its petition cites to the *Irvine* case for the proposition that Federal law is not "struck blind" by state law fictions concerning the ownership of property. In *Irvine*, the Court was faced with a taxpayer who was the beneficiary of a trust created by her grandfather. There was no question in that case that the individual taxpayer owned and possessed a present right or property interest in that trust, at the time it was created. The *Irvine* Court then examined whether a disclaimer of that interest which was valid under Minnesota Law, prevented the Internal Revenue Code from applying its gift tax provisions to the transfer of interest. *Irvine*, 511 U.S. at 229-230.

Such analysis is inapplicable to the facts before the Court in this case. In *Irvine*, the taxpayer owned a present property interest and the Court was ruling on whether or not state law permitting a disclaimer of that interest should be binding on the IRS. In this case, Donald Craft never owned an individual interest in the real property as that property right is defined under Michigan law. The *Irvine* holding regarding the failure of a Minnesota state law allowing a disclaimer of an interest admittedly done to prevent the application of the Internal Revenue Code, contains no precedent on whether the IRS tax lien attached to property in which Donald Craft held no individual interest. The IRS would have this Court believe that *Irvine* allows the federal tax lien to pierce all state law fictions concerning property ownership. What the IRS fails to distinguish is that the state law in *Irvine* dealt with the consequences of that state law fiction, rather than a state law fiction part of the definition of property rights in Michigan.

The petition also forwards the position that *Drye*, 528 U.S. 49 (1999) represents a "subsequent contrary view of the law by a controlling authority." The *Drye* opinion is nothing of the sort. If anything, this Court in *Drye* has provided a "nutshell" summary of all the leading cases prior to *Drye* relating to attachment of federal tax liens and has moved the factors to be considered even more in favor of the Respondent.

The *Drye* Court pointed out that in *Bess* it had previously held, "that no federal tax lien could attach to [insurance] policy proceeds unavailable to the insured in his lifetime." *Drye*, 511 U.S. at 57; citing *Bess*, 357 U.S. at 55-56. The Court also stated, albeit *in dictum*, that it did not "mean to suggest that an expectancy that has pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate." *Drye*, 511 U.S. at 57 n.7. By those statements, this Court would seem to have once again indicated that a present property interest as defined by state law must exist prior to the attachment of any federal tax lien.

Such language by the Court supports the Sixth Circuit's prior holdings to the effect that the United States, whether through its drug forfeiture statutes or its tax lien statutes, could only proceed against an interest held in the property by the criminal or delinquent taxpayer which remained *after* the tenancy was terminated i.e., when the separate interest of that individual ripened into a present possessory interest. *See Leroy Lane*, 972 F.2d at 138; *Craft*, 140 F.3d at 642.

Even the Court's reiteration in *Drye* of the statement that federal tax law is not struck blind by state law fictions as recited in *Irvine*, 511 U.S. at 240 represents no new change in controlling authority. *Id.* at 53. Furthermore, the *Drye* decision has not changed the law as applied by the lower court holdings in this appeal. The previous holdings of this Court in *Bess*, *Aquilino*, *Bank of Commerce* and *Morgan*, remain the same binding, holdings issued by this Court which have been repeated ad nauseum by the IRS in all its briefs in 1997, in all its briefs in 1999, and now in its petition.

Yet, the IRS in its petition, continues to attempt to have this Court focus solely on caselaw that discusses "property", "rights to property" and the effect of the Internal Revenue Code. What the IRS petition has not set forth is any credible caselaw or statute refuting the voluminous binding precedent which holds that "[s]tate law creates legal interests and right." *Morgan*, 309 at 80; *Aquilino*, 363 at 513; *Bess*, 357 U.S. at 56.

The pronouncement of this Court in *Morgan* was later reiterated by the *Aquilino* Court where it stated,

> The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts *must look to state law*, for it has long been the rule that "in the application of a federal revenue act, *state law controls* in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute". (Emphasis added).

Aquilino, 363 U.S. at 512-513. Citing *Morgan*, 309 U.S. at 82.

Therefore, the sole question for this Court to decide with respect to the issue of whether the IRS tax lien attached to tenancy by the entireties property in Michigan, is whether Michigan substantive real property law has changed. Voluminous Michigan caselaw representing over 100 years of Michigan decisions have embraced the common law concept of tenancies by the entireties being absolutely and completely immune from the creditors of one spouse, except in cases of fraud. Federal Court decisions interpreting those protections afforded by tenancy by the entireties in Michigan, as well as other states with similar common law, span nearly 50 years. Those Federal decisions uniformly upheld the protections inherent in a tenancy by the entireties until at least 1991.

The IRS has asserted throughout this litigation, that Michigan real property law has changed, or been implicitly changed by this Court's recent rulings. The IRS has been unable, however, to cite to any indication from any of the three bodies legally able to effect such a change, the Michigan Legislature, the Michigan Appellate Courts or the United States Congress.

Michigan law prior to 1991.

"In Michigan Real Property Law, tenancies by the entireties enjoy an ancient and hoary tradition" *Rogers*, 136 Mich. App. at 134. Tenancies by the entirety is a common law creation which has existed in Michigan for over 120 years. The Michigan Supreme Court stated as far back as 1885,

> The interest William Beamer took with his wife was a peculiar one. It was an entirety. *Fisher v. Provin*, 25 Mich. 347 [sic] (1872). They both took the same estate, the same interest, and it could not be separated. The right of the one was the right of the other. Neither could by a separate transfer affect the rights of the other or his own. What would defeat the interest of one would also defeat that of the other. (Cite Omitted) In a portion of these premises the interest of William Beamer was more than that of a joint tenant.

Vinton v. Beamer, 55 Mich. 559, 561 (1885).

The Michigan Supreme Court later clarified some of the distinctions between a tenancy by the entireties and an ordinary joint tenancy in 1891 when it stated, "The estate created by this deed was not an estate in joint tenancy, but an estate in entirety. A joint tenancy implies a seisin *per my et per tout*, while an estate in entirety implies only a seisin *per tout*." *Appeal of Lewis*, 85 Mich. 340, 341 (1891).

Recent Federal case law has explored the concept that each spouse in a tenancy by the entireties holds a separate right of survivorship, distinct to each spouse. Such a judicially-created concept does violence to prior Michigan precedent on that issue. The Michigan Supreme Court released in 1918 the seminal case on tenancy by the entirety in Michigan when it held,

> It is urged by counsel for plaintiffs and appellants that, before the death of either of the parties, each holds an estate similar in some respects to that of a contingent remainder, and that it has been held that a contingent remainder is not subject to execution.

> We think the better doctrine is that the right of survivorship is *merely* an *incident* of an estate by entirety, and does not constitute a remainder, either vested or contingent. *Davis v. Clark*, 26 Ind. 424 (1866); *Shinn v. Shinn*, 42 Kan. 1 (1889). . . .
> Therefore, it has been quite universally held that an estate by the entireties cannot be sold upon execution on a judgment rendered against either the husband or wife, because neither has any separate interest in such an estate. (Emphasis added).

Sanford v. Bertrau, 204 Mich. 244, 248-249 (1918).

The Michigan Supreme Court later emphasized the fictional unity of the husband and wife as one in 1936 when it stated,

> It is conceded the defendants are tenants by the entirety. Neither husband nor wife can sever such tenancy. They do not hold by moieties but by entireties. Neither can alienate a moiety so as to defeat the title to the survivor. Husband and wife take the estate as one person, and they take but one estate. *Palmer v. Treasurer and Receiver General*, 222 Mass. 263, 110 NE 283 (1915).

Nurmi v. Beardsley, 275 Mich. 328, 330 (1936).

That same year the Michigan Supreme Court discussed the scope of tenancy by the entireties characteristics again,

> It is well settled under the law of this State that one tenant by the entirety has no interest separable from the that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title. (6 Michigan Supreme Court citations omitted).

Long v. Earle, 277 Mich. 505, 517 (1936).

The District Court decision below held that, "At the time that the joint conveyance was made, the entireties estate terminated. At that point, each spouse took an equal half interest in the estate and the government's lien attached to Mr. Craft's interest." *Craft v. United States*, 74 A.F.T.R.2d (RIA) 6362.

Such a decision runs directly contrary to previous Michigan case law holding that a conveyance by one spouse in a tenancy by the entireties, to the other spouse constitutes a "release" and such a termination is allowed both by common law and by Michigan statute. MCLA § 557.101.

The Supreme Court reiterated the ability of one spouse to release their interest to the other in 1944 when it held,

> As to the real estate, it satisfactorily appears from the record that this parcel of real estate had been held by John Paulus and his wife Elizabeth for many years as tenants by the entirety and Paulus merely quit-claimed to his wife whatever interest he had therein. 3 Comp. Laws 1929, § 13069 (Stat. Ann. §26.201); *Ash v. Ash*, 280 Mich. 198 (1937). The validity of the quit claim deed is attacked by plaintiff, but if it were set aside the title would again be in the name of Paulus and his wife as tenants by the entirety and plaintiff would not be aided thereby because neither the land nor the rents in profit therefrom would be subject to levy on execution for the sole debt of the husband. *American State Trust Co. of Detroit v. Rosenthal*, 255 Mich. 157 (1931).

Farrell v. Paulus, 309 Mich. 441, 444-445 (1944).

The concept and ability of one spouse terminating his or her interest by releasing it to the remaining spouse was reiterated again in 1952 by the Michigan Supreme Court when it stated, "That the husband might have released his interest to the wife, thereby vesting her with full and complete title, is not open to question, *Ash v. Ash*, 280 Mich. 198, and prior decisions therein cited. CL. 1948 §557.101 (Stat. Ann. §26.201)." *Hearns v. Hearns*, 333 Mich. 423, 433 (1952).

The Michigan Supreme Court again revisited the scope of tenancy by the entireties ownership in 1954 when it held,

> An estate by the entirety is sometimes regarded as a species of, or modified form of, joint tenancy, the modification being rendered necessary by the common-law theory that husband and wife are but one person. The unities of time, title, interest, and possession are common to both estates but in an estate by entirety there is an additional unity, namely, that of person. Strictly speaking, a tenancy by entirety is not a joint tenancy but is a sole tenancy, and, while the 2 estates resemble each other and possess some qualities in common, yet they differ both in form and substance and are distinguishable.

Budwit v. Herr, 339 Mich. 265, 272 (1954).

The *Budwit* court went on to restate the prior holding in *Sanford v. Bertrau*, to the effect that the survivorship aspect of a tenancy by the entireties is merely *incident* to the estate and does not constitute a remainder of any kind, either vested or contingent. *Budwit*, 339 Mich. 272-273.

The IRS took the position in the lower court that Michigan real property law changed with the enactment of Public Act 288 of 1975, now clarified as MCLA § 557.71. That statute was designed to equalize women's rights in, as well as control of tenancy by the entireties property, yet the IRS has taken the position that it has created a separate interest in each spouse in a tenancy by the entireties. Since that law's enactment, however, no Michigan case has construed that statute to reflect such a change. To the contrary, Michigan courts since that time have continued to uphold the long-standing concept of unity of husband and wife as one, with neither spouse holding *any* rights or interest separate from each other. That position was again restated in 1984 by the Michigan Court of Appeals when it held,

> In a true tenancy by the entireties, each spouse is considered to own the whole and, therefore, is

> entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. One incident of an estate by the entireties is that the survivor, whether husband or wife, is entitled to the whole and such right cannot be defeated by a conveyance by one spouse to a stranger.

Rogers, 136 Mich. App. at 134-135.

The following year, the Court of Appeals specifically rejected the position taken by the IRS at the lower court. The Court of Appeals ruled on an assertion by a creditor that the enactment of 1975 Public Act 288 legislatively overruled the common-law provision that rents obtained from tenancy by the entireties properties were not subject to garnishment by the creditors of one spouse. That court provided insightful guidance not only as to the effect of the enactment of that statute, but what would be required to change Michigan real property law.

> Plaintiff cites MCL §557.71; MSA §26.210(1), adopted in 1975, for the proposition that the Legislature has overruled the common-law provision that rents from properties by the entireties are not subject to garnishment by one spouse's creditor. That statute provides:
>
> A husband and wife shall be equally entitled to the rents, products, income or profits, and to the control and management of real or personal property held by them as tenants by the entirety.
>
> Again, however, plaintiff cites no cases which have construed the statute in such a way and we decline to do so. The effect of the statute is merely

> to modify the common-law rule that a husband had absolute control over property held by the entireties and the rent derived therefrom. To the extent that the material appended to plaintiff's brief constitutes legislative history, that legislative history does not support plaintiff's interpretation. * * * We cannot read into the statute an intent to extinguish the estate by the entireties or to make an estate by the entireties or its rent subject to garnishment by the creditors of one spouse.
>
> If, as argued by plaintiff, the estate by entireties has outlived its usefulness and should be abolished, it is up to either the Legislature or the Supreme Court to make that determination. The last statements on this issue by the Legislature and by the Supreme Court have recognized the existence of an estate by the entireties. This Court is bound by those determinations.

SNB Bank & Trust v. Kensey, 145 Mich. App. 765, 776-777 (1985).

The last Michigan case that Respondent cites to this Court to is the 1990 Supreme Court decision in *Albro v. Allen*, 434 Mich. 271 (1990). This case is important in that the Michigan Supreme Court specifically discussed joint tenancies with a right of survivorship and the ability of one joint tenant to partition the estate, transfer his or her interest, and do so without effecting a recognized, separate right of survivorship. This case only serves to highlight the difference, by definition and function, between a tenancy by the entireties in Michigan and a joint tenancy with rights of survivorship.

Federal law prior to 1991.

The Federal Court decisions interpreting the protections offered by tenancy by the entireties in Michigan likewise represent a long history of case law upholding the inability of creditors of one spouse from attaching, liening, or executing against tenancy by the entireties property for one spouse's debts.

> While the rule in a number of states is to the contrary, the Supreme Court of Michigan has consistently aligned itself with what appears to be the majority rule to the effect that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse. *Vinton v. Beamer*, 55 Mich. 559 (1885); *Dickey v. Converse*, 117 Mich. 449 (1898); *Schliess v. Thayer*, 170 Mich. 395 (1912); *Turner v. Davidson*, 227 Mich. 459 (1924). . . . In the enforcement of the taxing laws of the United States, the Federal Courts, in determining the extent of a taxpayer's property interest in real estate, are bound by state rules of property. *Poe v. Seaborne*, 282 U.S. 101 (1937).

Shaw v. United States, 94 F. Supp. 245, 246 (W.D. Mich. 1939).

The Sixth Circuit discussed the characteristics of Michigan tenancy by the entireties ownership in a 1940 decision,

> The nature of such estates prevents their sale or disposal, or any part thereof, by either the husband or the wife without the assent of both. The whole remains to the survivor. Neither can convey, *encumber* or at all prejudice such estates without the consent of the other. The unity of the husband and wife as one person and the ownership of the estate by that person prevents the disposition of it otherwise than jointly.

Schram v. Burt, 111 F.2d 557, 561 (6th Cir. 1940).

The *Burt* Court had previously pointed out distinctions which recent decisions seemed to gloss over. "Their genesis lies in the maxim 'man and wife are as one person.' As a consequence of this relationship, many incidences flow therefrom quite different from those arising from a joint tenancy or any other form of co-ownership." *Burt*, 111 F.2d at 561.

The peculiar nature of the protections afforded by a tenancy by the entireties in Michigan was again addressed by U.S. District Court in Michigan when it stated in 1945,

> We find no designation in the Federal Revenue Act by which a tax may be imposed upon property held by the entirety for taxes due from the husband alone. Michigan decisions covering property by entirety follow the common law and have withstood the onslaught of creditors for years. Neither the husband nor the wife has an individual, separable interest in entirety property. Neither can convey an interest without the aid of the other. Neither husband nor wife can sever the tenancy. They take the estate as one person and they take but one estate.

United States v. Nathanson, 60 F. Supp. 193, 194 (E.D. Mich. 1945), citing seven Michigan Supreme Court cases.

The Sixth Circuit again visited the issue of Michigan tenancy by the entireties ownership in 1959 when it stated,

> A tenancy by the entirety in real property is an estate in land accruing to the husband and wife wherein both are seized of the entirety so that neither can dispose of any part without the consent of the other, nor may either subject it to payment of his or her individual debts * * * It is described as "a peculiar and anomalous estate." Each (husband and wife) is seized per tout et non per my; there is but one estate. Whether or not an estate by the entirety has been created in property depends on state law.

Fetter v. United States, 269 F.2d 467, 469 (6th Cir. 1959).

In *Fetter*, the Sixth Circuit went on to cite an earlier U.S. District Court of Michigan decision discussing the characteristics of tenancy by the entireties ownership stating,

> * * * but the *title itself* to the property held by such an estate is not capable of division into separate interests, undivided or otherwise, but is one "entirety," entirely owned by each tenant. There is,

> therefore, in such a tenancy, no title owned by one of such tenants, and no "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him,". . . .

Fetter, 269 F.2d at 470, citing *McMullen v. Zabawski*, 283 F. 552, 556 (E.D. Mich. 1922).

The protections inherent in a tenancy by the entireties in Michigan were central to another decision by the U.S. District Court in Michigan in 1963. That Court held that,

> Under Michigan law, neither the husband nor the wife has an individual, separate interest in entirety property, *United States v. Nathanson*, supra; *Long v. Earle*, supra; *Vinton v. Beamer*, supra; and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. *Schram v. Burt*, supra; *French v. Foster*, 307 Mich. 361 (1943); *Arrand v. Graham*, 297 Mich. 559 (1941); *Long v. Earle*, supra; *Hearns v. Hearns*, supra; *Schulz v. Silver*, 323 Mich. 454 (1949). One incident of an estate by the entirety is that the survivor, whether husband or wife, is entitled to the whole, and such right cannot be defeated by a conveyance by one spouse to a stranger." *Guldager v. United States*, 204 F.2d. 487 (6th. Cir. 1953); *Lilly v. Schmock*, 297 Mich. 513 (1941); *Detroit & Security Trust Co. v. Kramer*, 247 Mich. 468 (1929).

McLean v. United States, 224 F. Supp. 726, 728-729 (E.D. Mich. 1963).

The Sixth Circuit then issued the seminal opinion of *Cole v. Cardoza* in 1971. That case, simply put, is "on all fours" with the present case. Just as in Mrs. Craft's case, the *Cole* Court was called upon to determine whether a federal tax lien filed only against the husband based on taxes owed by the husband alone, could attach against tenancy by the entireties property owned in Michigan. Unless the IRS can demonstrate

that Michigan substantive real property law has changed, the only difference between the *Cole* case and that of Mrs. Craft, is the dates and the names, at least as to the issue of whether the tax lien attached at the moment it was filed by the IRS.

Based on the duplication of facts between *Cole* and that of Sandra Craft during the tenancy by the entireties, it is important to revisit the language of the Sixth Circuit concerning the attachment of a Federal tax lien to tenancy by entireties:

> This issue involves two questions. Does the Federal tax lien attach to the above named property? If not, does it constitute a cloud on the title to the property such that the appellants are entitled to have it removed? In answering both questions, we look to the law of Michigan which governs the property rights of the taxpayers. *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Aquilino v. United States*, 363 U.S. 509 (1960).
>
> The Government concedes that under Michigan law it has no valid claim against the home of the appellants. *Shaw v. United States*, 94 F.Supp. 245 (W.D. Mich. 1939); see *United States v. Nathanson*, 60 F.Supp. 193 (E.D. Mich. 1945). In Michigan tenants by the entirety hold under a single title. Neither spouse has the power without the concurrence of the other to alienate the estate or any interest therein, and neither the land nor the rents and profits therefrom are subject to levy or execution for the sole debts of the husband. *Farrell v. Paulus*, 309 Mich. 441, 445 (1944). Thus, in the present situation, the federal tax lien *does not attach* to the subject property owned by Eugene and Mary Cole by the entirety, because the Government's tax lien is against

> Eugene Cole only. If the lien constitutes a cloud on the title to that property, appellants are therefore entitled to have the lien declared a nullity as to the property. (Emphasis added).

Cole v. Cardoza, 441 F.2d 1337, 1343 (6th Cir. 1971).

The ruling of the Sixth Circuit is pristinely clear and remarkably applicable to Ms. Craft's case. The tax lien for Donald Craft only did **not** attach to tenancy by the entireties property in Michigan prior to the termination of the tenancy.

The Sixth Circuit again discussed tenancy by the entireties protections in 1985. The Court decided a case dealing with the converse of whether a creditor of one spouse could reach entireties property, that is, whether joint creditors of both spouses could reach tenancy by the entireties property. The Sixth Circuit reiterated previous positions dealing with the peculiar characteristics of tenancy of the entireties property.

> Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be husband and wife, hold under a single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property. See *Sanford v. Bertrau*, 204 Mich. 244 (1918).
>
> * * * Under Michigan law, ordinary creditors cannot reach interests in entireties property, and the entire interest will therefore be exempt if there are no joint creditors. Joint creditors, however, can reach the entireties interest, subject only to the $3,500 homestead exemption in Mich.. Const. art. 10, § 3."

In the Matter of Grosslight (*Liberty State Bank and Trust v. Grosslight*), 757 F.2d. 773, 775-776 (6th Cir. 1985).

The Sixth Circuit again had the opportunity to revisit tenancy by the entireties ownership in Michigan in the very case that the Internal Revenue Service asserts stands for the

proposition that Michigan law concerning tenancy by the entireties contains a separate right of survivorship in each spouse, which therefore can be attached by the Federal tax lien. Such a position, however, directly contradicts the clear and unequivocal language of the Sixth Circuit in that case.

> Under Michigan law, entireties property may be levied upon by the State for nonpayment of real estate taxes on the real property itself. See *Robbins v. Barron*, 32 Mich. 36 (1875). However, entireties property may not be attached to satisfy the personal tax liability of a single spouse. *Cole v. Cardoza*, 441 F.2d at 1343; *United States v. Nathanson*, 60 F.Supp. 193 (E. D. Mich. 1945).

Leroy Lane I, 910 F.2d at 350.

The Sixth Circuit again revisited its treatment of tenancy by the entireties property when that same case came before at a second time in 1992. The Court stated at that time that the Government was precluded from obtaining the husband's interest in the tenancy by the entireties property, unless the wife predeceased him, there was a divorce, or the entireties estate was jointly conveyed and that the Government's interest in the property was most analogous to the position of a judgment creditor under Michigan law. *Leroy Lane II*, 972 F.2d at 137 The Court went on to clarify its previous ruling:

> The government argues that by virtue of the federal forfeiture statute and our prior opinion in this case, they stepped into Mitchell Marks' place and therefore, should receive one-half of the property. We disagree. As we stated in our prior opinion, the federal forfeiture statutes do not operate to destroy the fundamental characteristics given to real property by the states. See *Certain Real Property*, 910 F.2d 349. To allow the United States to step into Mitchell Marks' place as a tenant by the entirety would destroy the tenancy by the entirety because the unities of time, title, and person would be violated.

> The government did not and could not possess Mitchell Marks' present interest in the tenancy by the entirety. The government's interest comes into being only when the tenancy by the entireties is destroyed either by death, divorce, or operation of Michigan law. When the tenancy by the entireties is destroyed, the government gets whatever Mitchell Marks possesses after the entireties estate is destroyed. In this case, by virtue of the divorce court's distribution of the property, Mitchell was left with no part of the property.

Leroy Lane II, 972 F.2d at 138.

Specifically, what the Sixth Circuit did not state was that the Government possessed Mitchell Marks' right to survivorship by virtue of the application of the drug of forfeiture statute, a statute which unquestionably provides the United States with greater and more far reaching powers against an individual's property than does the Internal Revenue Code. What the Sixth Circuit did state was that the Government could only get whatever interest the husband possessed *after* the entireties estate was destroyed. Just as in the *Leroy Lane* cases, after the tenancy by the entireties was destroyed, the husband here was left with no part of or claim to the property. In *Leroy Lane*, however, the Sixth Circuit was concerned that the United States had not been afforded the opportunity to represent its claim to an interest in that entireties estate before the divorce court.

In the present case, however, the IRS not only had actual notice of Don Craft's Chapter 7 bankruptcy, but was actively involved in an adversary proceeding in that bankruptcy on the exact issue before this Court. Further, the IRS was actively negotiating an escrow agreement which allowed the sale of the property held as tenancy by the entireties to be closed in June of 1992, pending discussions and/or litigation between the parties as to the attachment of the tax lien. The IRS could have pursued their rights to claim an interest in this property held as

tenants by the entirety during Don Craft's bankruptcy. The IRS chose not to do that and instead relied on its assertion that its tax lien against Don Craft alone attached to his interest in the tenancy by the entireties property despite that position being contrary to all relevant case law.

What has Changed?

Voluminous Michigan precedent for more than 100 years, as well as a significant number of Federal cases addressing Michigan tenancy by the entireties, clearly stand for the proposition that neither tenant in an entireties estate owns or possesses any separate right, including a right to survivorship, that is capable of being alienated, transferred, levied, garnished upon, or subjected to a creditor's lien. The question then becomes what has changed in Michigan real property law to support the Petitioner's argument?

The Respondent would answer unequivocally, "Nothing!" Given the fact that tenancy by the entireties is a common-law creation of Michigan real property law, there are three entities that properly have the power and authority to change what is current law in Michigan. The first would be the Michigan legislature by simply deciding that the concept of tenancy by the entireties needs to be codified, or in the alternative, has outlived its usefulness and some statute needs to be passed to replace or reject or eliminate that concept. The second entity which could change tenancy by the entireties law is the Michigan Appellate Court system. Either the Michigan Court of Appeals or the Michigan Supreme Court could, by its rulings change, modify or outright eliminate tenancy by the entireties in Michigan. The last entity which legally could change the concept of tenancy by the entireties ownership in Michigan would be the United States Congress by amending any number of Federal statutes and specifically modifying or eliminating the protections afforded by tenancy by the entireties ownership.

Absent some indication by one of those three entities that the substantive real property law concept of tenancy by the

entireties ownership has changed, it is inappropriate for a Federal Court to determine that substantive Michigan real property law should be changed, altered or eliminated.

The Michigan legislature has not taken any action specifically or impliedly to change, alter or eliminate those protections encompassed by tenancy by the entireties ownership which are at issue in this case. The position taken at trial by the IRS was that 1975 Public Act 288 created a separate interest in each spouse. That is simply an incorrect statement of the law and has been rejected by the Michigan Court of Appeals in *SNB Bank & Trust*, 145 Mich. App. 765, as discussed above.

The Michigan Appellate courts have likewise not indicated by their rulings, any change in the protections afforded by tenancy by the entireties ownership since that statute in 1975, or since this Court's 1971 *Cole v. Cardoza* ruling. To the contrary, the rulings of *Rogers* in 1984, *SNB Bank & Trust* in 1985, *Tamplin v. Tamplin* in 1987 and *Albro v. Allen* in 1990 represent a continuing pattern of cases upholding the continued vitality of tenancy by the entireties protections in Michigan.

Lastly, the United States Congress could pass various legislation which would modify, curtail or eliminate those protections afforded spouses in Michigan under tenancy by the entireties ownership. Section 522(b)(2)(B) of Title 11, the Bankruptcy Code separate specifically provides for the continuing recognition of the status provided by tenancy by the entireties ownership. Congress could have eliminated such a protection from its exemption scheme for Federal bankruptcy purposes, but instead has continued to recognize that concept through at least five significant reforms and amendments.

The Respondent respectfully asserts that none of the three entities properly able to change the concept of tenancy by the entireties ownership in Michigan have done so and that this Court should therefore deny Petitioner's petition for certiorari.

E. This case does not have such far-reaching implications or compelling reasons as to merit granting certiorari to review multiple decisions of the Sixth Circuit.

There is no conflict between the Circuits that would suggest a need for this Court to grant certiorari on the issue presented in the petition. The IRS has not offered, much less demonstrated at any lower court, that this decision affects the residents of any other State other than taxpayers in the State of Michigan.

The Petitioner would have this Court believe this case has far-reaching implications of a most compelling nature because of what it believes is the creation of an "easy avenue for tax avoidance". The IRS defers attention from the fact that this case only reaffirms the long-standing legal holding and principle of *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971). Despite no less than three evidentiary hearings before the District Court in this case, the IRS has never presented any factual evidence whatsoever of another taxpayer, even in Michigan, who has availed themself of this supposedly "easy avenue for tax avoidance" despite this legal principle being the status quo in federal court in Michigan for a minimum of sixty years, and in Michigan courts for over 100 years.

The IRS continues throughout this litigation to make representations to the Court about facts not in evidence. Now for the first time the IRS would have this Court consider what it states without any support, to be statistics concerning the effects of tenancy by the entireties on married taxpayers' delinquency rates in Michigan. (Petitioner's brief, n.7, p. 11)

The Petition continues with an additional argument concerning the Michigan statutory definitions of joint tenancies, and the alleged future interests included therein (Petition, pp. 12-13), repeating an argument made for the first time at oral argument before the Sixth Circuit on August 10, 2000. It is black-letter law that a party cannot raise an argument for the first time on appeal and the IRS should be barred from making its argument over the statutory definitions of joint ownership

for failing to raise it at any prior trial. *Helvering v. Wood*, 309 U.S. 344, 349 (1940); *Burnet v. Commonwealth Improvement Co.*, 287 U.S. 415, 418 (1932).

The Petition continues to represent to the Court that certiorari should be granted because the decisions of the Sixth Circuit conflict with controlling decisions of this Court. That very argument was rejected by the Sixth Circuit no less than four times, twice by vote of the entire panel of judges on the Sixth Circuit.[1] As discussed in the preceding section, that recurring statement by the IRS reflects analysis and conclusions that are simply inaccurate and misleading.

The well-reasoned decisions of the Sixth Circuit Court of Appeals correctly apply the controlling precedent of this Court with respect to the issue of state law property rights. This Court should not disturb the Court of Appeals' findings which are not in any manner repugnant to any prior holding of this Court.

CONCLUSION

The petition for writ of certiorari should be dismissed or denied as unnecessary for the all reasons stated above.

Respectfully submitted,

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1. The Sixth Circuit rejected that exact argument by the IRS in the *Craft I* decision released on April 1, 1998; it rejected that argument again as part of the *unanimous* vote to deny a petition for hearing *en banc* in December, 1999; it rejected that argument again at oral argument and as indicated in the *Craft II* decision released on November 22, 2000; and it rejected that argument for a fourth time by majority vote of the judges on the Court in denying a petition for rehearing *en banc* on March 16, 2001.